

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1026 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed  
to see the judgements?

No.

2. To be referred to the Reporter or not? No.

J

3. Whether Their Lordships wish to see the fair copy  
of the judgement? No.

4. Whether this case involves a substantial question  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge?

No

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HEIRS OF AMRUTLAL A PANCHAL

Versus

PANCHAL JAYANTILAL ADITRAM

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Appearance:

Mr.R.N. Shah for appellants

Respondents served

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CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 08/01/97

ORAL JUDGEMENT

Appellants, who are heirs of the original  
plaintiff, Amrutlal Aditram Panchal, have filed this  
appeal under Section 96 of the Code of Civil Procedure,

challenging the judgment and decree dated December 30, 1978, passed by the learned Joint Civil Judge (S.D.), Nadiad, in Special Civil Suit No. 33 of 1974, whereby the learned trial Judge, while rejecting other claims of the plaintiff, directed the defendant No.1, Jayantilal Aditram, to pay to the plaintiff and the defendant No.2A jointly a sum of Rs.3149/-.

The plaintiff had filed Special Civil Suit No. 33 of 1974 in the court of the Civil Judge (S.D.), at Nadiad, against defendant No.1, for partition of the properties of their father, Aditram Panchal and for possession of 1/3rd share of the properties of the Hindu joint family, which would come in his share.

As per the case of the plaintiff, the plaintiff and defendant No.1 are true brothers and defendant No.2 is their true sister. Aditram Govindbhai Panchal, who died on February 7, 1974, was the father of the plaintiff and the defendants. It is averred that till the death of their father, plaintiff, defendant No.1 and defendant No.2 were members of the Hindu Joint Family.

It is averred by the plaintiff in the plaint that the property bearing Panchayat No.2212 situated opposite Dakore S.T. Station was belonging to the joint family; After death of Aditram, defendant No.1 disposed of some of the movable properties from the shop run in the suit property without knowledge of the plaintiff; When the plaintiff came to know of this fact, he had told defendant No.1 to partition the properties of Hindu joint family, but the defendant refused to do so and gave evasive reply and therefore the plaintiff was constrained to sue defendant No.1 to get the properties of Hindu joint family partitioned by metes and bounds to get his 1/3rd share from the properties and also to get possession of the properties which would come to his share; One house bearing G.P. No.2951/4/1/56 situated on Vahorvad Naka near Jakhedia Nala in Dakor, which is valued at Rs.20,000/-, consisting of a shop situated on the open land, was also of the joint family property.

Defendant No.1, by filing his written statement at Exh.26, inter alia, denied that house bearing G.P. No.2951/4/1/56 was purchased by the father out of the amount of the joint family and the said house was got repaired out of the earnings of their Hindu joint family. It is contended that late Aditram originally belonged to Balasinor and in or about 1934 A.D., the plaintiff, defendant No.1, defendant No.2 and their father had come to Dakor for establishing a business from Balasinor for

the first time and that the father hired a house which is now in possession of the plaintiff and, in that house, they were running a shop on the ground floor and were residing in that very house. In the year 1948, Aditram had started a small factory at Ahmedabad in partnership and the plaintiff was doing management of that factory at Ahmedabad at the instance of the father. After some time, the factory at Ahmedabad was sold out by the plaintiff and he had come again to Dakor to reside with defendant No.1 and the father. It is contended that due to quarrelsome nature of the plaintiff, disputes had cropped up between the father and the plaintiff and, therefore, the plaintiff was given a house in which he was residing and carrying on business. Thus, in 1949 A.D., the shop being run jointly by the plaintiff, defendant No.1 and their father and all the household kits of that house, in which they were residing jointly, were given to the plaintiff alone and defendant No.1 and his father had separated permanently from the plaintiff. It is contended that since 1949 A.D. the plaintiff was separated from the Hindu joint family consisting of defendant No.1, their father Aditram and the plaintiff, whereas defendant No.1 and father Aditram had continued as members of the Hindu joint family. It is further contended that since the year 1949, the plaintiff had not only separated in residence but he was also separated in business and in other things also he did not continue as member of the joint family. It is further contended that the Hindu joint family consisting of defendant No.1 and father Aditram was continued till the death of the father in the year 1974. After death of the father in 1974, defendant No.1 alone by virtue of survivorship was the exclusive owner of the properties of the Hindu joint family and the plaintiff and defendant No.2 did not have any share in any of the properties. It is further contended that after the plaintiff was separated from the joint family, defendant No.1 and father Aditram had hired an open plot opposite S.T. Station at Dakor bearing No.2212 and in the beginning a Katchcha Shed of jute cloth was erected over that land and in that shed they had started the work of iron-smith. In the property bearing No.2212, the plaintiff had never done any business nor he had sat in that shop, as he had no interest or share in the house or business. It is further contended that when defendant No.2 was got married defendant No.1 and his father, Aditram, had given to her whatever she was deserving and was entitled to and, therefore, she had no right, title or interest in the properties shown in the schedule attached to the plaint. It is also contended that as per the will of deceased Aditram dated February 5, 1974, and agreement

dated February 6, 1974, the plaintiff would be entitled to get half of the amount of value of the shed of property bearing No. 2212. As per this arrangement, value of the shed was assessed at Rs. 3000/- and the plaintiff had agreed to take Rs. 1500/- as his share in that shed. But, due to instigation of Someshwar Mehta, the plaintiff had refused to act upon that agreement and to accept Rs. 1500/-. It is further contended by defendant No. 1 that as per the terms of the will of deceased Aditram, defendant No. 1 is ready and willing to give Rs. 2000/- to the plaintiff, and also ready and willing to give Rs. 1500/- as share of the shed as mentioned in the will. That as per the terms of the will and the agreements executed in February 1974, defendant No. 1 is entitled to Rs. 200/- being 1/2 value of iron cupboard and the amount of Rs. 151/- being the excess price of the additional silver utensils taken by the plaintiff and thus, in all, defendant No. 1 is entitled to get set off of Rs. 351/- from the plaintiff. That the plaintiff had also taken a pronote regarding the same which he was entitled to get from defendant No. 1 as per the agreement and the will of deceased Aditram. Defendant No. 1, therefore, contended that neither the plaintiff nor defendant No. 2 is entitled to get any share in the properties of Hindu joint family of Aditram, and the suit be dismissed with costs.

Defendant No. 2 filed her written statement Exh. 33 supporting the case of the plaintiff and contended that she being legal heir of deceased Aditram, is entitled to get 1/3rd share in the joint family properties. It is denied that Aditram had executed a will and that, prior to death, Aditram was seriously ill and was in a semi-conscious state of mind. That the agreement and will referred to by defendant No. 1 in his written statement are not legal or admissible in evidence.

Defendant No. 2/A was duly served in the suit, but he did not appear and, therefore, the suit proceeded ex-parte against him.

The learned trial court framed issues at Exh. 35. After appreciating the oral as well as documentary evidence adduced by both the parties, the learned trial judge arrived at the conclusion that:

- (i) the plaintiff had failed to prove that the suit property bearing No. 2911/4/1/56 of Dakor is joint family undivided property of deceased father of plaintiff and defendants;
- (ii) the property bearing House No. 2212 of Dakor was not joint family property and, therefore, was not

- available for partition;
- (iii) business run in shop in H.No.2212 was not joint family business of plaintiff and defendants;
  - (iv) since 1979 A.D. the plaintiff had separated from the joint family and defendant No.1 had become the sole owner of the suit property;
  - (v) deceased Aditram had executed a will dated February 5,1974 on a sound state of mind;
  - (vi) house No.2951 was exclusively belonging to defendant N.2. That house No.2951/4/1/56 was exclusively belonging to defendant No.1;
  - (vii) all the movable properties mentioned in paragraph 11 of the written statement of defendant No.1 were delivered to the plaintiff as per the terms of the will of deceased Aditram.
  - (viii) the plaintiff was entitled to Rs.2000 plus Rs.1500 as per the terms of the will and defendant No.1 was entitled to claim set off of Rs.351/as mentioned in paragraph 11 of his written statement.

In view of the above-referred findings arrived at by the learned trial judge, defendant No.1 was directed to pay to the plaintiff and the defendant No.2 jointly a sum of Rs.3149/-. With regard to the rest of the claims of the plaintiff, the suit came to be dismissed, which has given rise to filing of this appeal by the heirs of the deceased plaintiff.

The learned counsel Mr.R.N.Shah for the appellants taken me through the oral as well as documentary evidence produced at the trial of the suit. It is submitted by the learned counsel that the trial court had erred in not believing the plaintiff's case that he was member of the joint family which consisted of the plaintiff, his father Aditram, defendant No.1 and his sister defendant No.2. It is further submitted that house bearing No.2212 and house No.2911/4/1/56 of Dakor were belonging to joint family and, therefore, the plaintiff was entitled to get 1/3rd share from these two houses as well as 1/3rd share in the movable properties lying in the two houses. It is further submitted that the will of the deceased Aditram was inadmissible in evidence, as it was not executed by deceased Aditram in a sound state of mind.

I have gone through the oral as well as documentary evidence adduced by the parties at the trial, which clearly establish that the plaintiff, due to clangorous nature and behaviour, had separated himself from the joint family in the year 1949. Oral evidence of defendant No.1 proves beyond a pale of doubt that the

plaintiff used to pick up quarrels with deceased Aditram and because of his attitude, deceased Aditram along with defendant No.1 had separated from the plaintiff and had gone to stay in another house at Dakore. There is cogent and reliable evidence on the record of the case to show that the plaintiff had separated from the joint family in the year 1949 and the finding of the learned trial judge to that effect is eminently just, proper and deserves to be upheld.

The deceased Aditram had executed a will on February 5, 1974. A true copy of the will was produced at Exh.162, whereas the original will is in possession of the plaintiff. The will is proved by the Bond Writer, Ratilal Chhaganlal. He had said on oath that on February 5, 1974 the will was drafted and written by him as per the instructions of Aditram and its contents were read over to Aditram by him and Aditram had affixed his thumb mark and at that time Someshwar Mehta, who was present had attested the thumb mark of deceased Aditram. Witnesses Manilal Nathalal, Himatlal Keshavlal and Vishnubhai Ishwarbhai have also deposed that they had put their signatures in that will. The oral evidence of the abovereferred witnesses proves beyond doubt that the deceased Aditram had executed the will on February 5, 1974 in a sound state of mind and, therefore, the finding of the learned trial Judge to that effect also deserves to be upheld. As per the contents of the will, brass and copper utensils were already divided equally between the plaintiff and the defendants and each of them had taken the utensils coming in their share. Contents of will also show that the deceased Aditram had divided the open land of the property bearing No.2212 equally in two shares between the plaintiff and defendant No.1. The deceased also in his will stated that he had sold one house in Balasinor for a consideration of Rs.5,000/-. Out of that, he had spent Rs.1000/-, while remaining Rs.4,000/- were equally divided between the plaintiff and defendant No.1. It is pertinent to note at this stage that the will which contains many details of movable and immovable properties belonging to deceased Aditram does not mention house No.2951/4/1/56. Had that house been purchased out of the amount of the joint family by deceased Aditram and defendant No.1, there would have been a mention of that house in the will. The finding of the learned trial judge that, as per the terms of the will, the plaintiff was entitled to Rs.3149, is eminently just and proper and deserves to be upheld. The finding of the learned judge to the effect that the house No.2951/4/1/56 belongs to defendant No.1 also deserves to be upheld because that house was inherited by defendant

No.1 due to the death of Aditram by virtue of survivorship. Looking to the evidence on record, in my opinion, the findings of the learned trial judge that the plaintiff had already separated from the joint family in the year 1949 and, therefore, there was no joint family property after 1949 which requires to be partitioned between the plaintiff, defendant No.1 and defendant No.2, call for no interference in this appeal. The plaintiff had ceased to be a member of the joint family since 1949. Similarly defendant No.2 was also not a member of the joint family since as per the will the deceased Aditram had already given her share during his lifetime and, therefore, defendant No.2 also cannot claim any share in the joint family property.

In view of the foregoing discussion, none of the contentions advanced by the learned counsel for the appellants has any substance, and I do not find any merit in the appeal and it deserves to be dismissed.

In the result, the appeal is dismissed with no order as to costs.

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